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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 332 of 1979

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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KHOJA NURALI ALIAS NATHU V.

Versus

HEIRS OF SINDHI JETHANANAND K LOHANA

Appearance:

MS VASUBEN P SHAH for Petitioner
Mr Mithani for MR PM RAVAL for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 27/01/98

ORAL JUDGEMENT

1. This appeal arises of the judgment and order passed in Civil Suit No. 46 of 1975 by the learned Civil Judge, Senior Division, Junagadh, on 30th November, 1978. The appellant before this Court is the original plaintiff (hereinafter referred to as 'the plaintiff'). It appears that the plaintiff was the owner of a residential house

situated at Luhar Chowk, Una (hereinafter referred to as 'the suit house'). The suit house was in the possession of the defendant Jethanand Kevalram who died pending the suit and the present respondents are the heirs and legal representatives of the said Jethanand Kevalram.

2. It was the case of the plaintiff that the suit house belonged to his father. On demise of his father in the year 1949, the suit house devolved upon his heirs, namely, the widowed mother of the plaintiff, his brother, his sister and the plaintiff. In 1952, a family arrangement was made and the suit house came to the exclusive share of the plaintiff. A deed of relinquishment was executed by the brother and the sister of the plaintiff on 16th April, 1952. Since then, the plaintiff was the exclusive owner of the suit house. The plaintiff thereafter in the year 1958 or thereabout, emigrated to Mozambique and from there, he emigrated to Portugal. Since then, he has been residing at Lisbon (Portugal) and except for few visits to India, he has not returned to India. During one of such visits in the year 1973, he learnt that the defendant Jethanand Kevalram was in possession of the suit house. It is further averred that the suit house was let to one Raichand Ramchand at a monthly rent of Rs.8/- . Said Raichand Ramchand died some four years before and after the death of Raichand Ramchand, the defendant Jethanand Kevalram had trespassed into the suit house and had occupied the house. He, therefore, instituted the above suit for possession and mesne profit.

3. The suit was contested by the defendant Jethanand Kevalram. He denied that he was inducted by Raichand Ramchand or that he had trespassed in the suit house. He raised the defence that he was a refugee and had migrated to India from the territories, now forming part of Pakistan and that the suit house was let to him by the Custodian appointed under the Administration of Evacuee Property Act, 1950, at the rent of Rs.8/- per month.

4. The suit was tried by the learned Civil Judge, Senior Division. He held that the defendant was not the trespasser in the suit house. The suit house was declared to be evacuee property and vested in the Custodian. The Custodian had let it to the defendant Jethanand Kevalram for the rent of Rs.8/- per month. The defendant Jethanand Kevalram, therefore, cannot be said to be a trespasser. The learned trial Judge further held that, whether the suit house was lawfully declared to be evacuee property or not, was not the issue which could have been tried by the Civil Court. Besides, the

Custodian being not a party to the said suit, it could not have been decided whether the suit house was declared to be evacuee property or not also could not be decided. The learned Judge, therefore, dismissed the suit. Feeling aggrieved, the plaintiff has preferred the present appeal, as aforesaid.

5. Learned advocate Ms. Brahmbhatt has appeared for Ms.V.P.Shah, the learned advocate appearing for the appellant and has submitted that the defendant failed to prove that the suit house was declared to be evacuee property. She has submitted that the plaintiff had categorically averred that no notice under the Act of 1950 was ever served upon the plaintiff by the Custodian. No inquiry was made by the Custodian as envisaged under the Act. The suit house, therefore, could not have been declared to be evacuee property. She has further submitted that the plaintiff was residing in India till 1958 and he emigrated to Mozambique some time in the year 1958. He had not emigrated on account of the communal disturbances. In no circumstances, therefore, the plaintiff could have been declared to be evacuee nor the suit house could have been declared to be evacuee property. She has submitted that the plaintiff has produced sufficient evidence to support his claim of being the exclusive owner of the suit house and he being the owner, the possession of the suit house should have been directed to be handed over to the plaintiff. She has submitted that the learned trial Judge has erred in holding that in absence of the Custodian, the issue whether the suit house was declared to be evacuee property or not could not have been decided. In support of her claim, she has relied upon the judgments in the matters of: EBRAHIM ABOOBAKER AND ANR., v. TEK CHAND DOLWANI, [AIR 1953 S.C. 298]; and DR. RAJENDRA PRAKASH SHARMA v. GYAN CHANDRA AND ORS., [AIR 1980 S.C. 1206].

6. The appeal is contested by learned Advocate Mr. Mithani. Mr.Mithani has submitted that it was precisely the case of the plaintiff that the defendant Jethanand Kevalram was a trespasser in the suit house. However, the defendant has produced cogent evidence to establish that he was not a trespasser in the suit house. He has submitted that the defendant not being a trespasser, could not be directed to hand over vacant possession of the suit house to the plaintiff. If at all the plaintiff were wrongfully declared to be evacuee or the suit house was wrongfully declared to be evacuee property, the remedy to the plaintiff lay elsewhere and no proceeding before the Civil Court in this respect is maintainable. He has submitted that the learned trial Judge has rightly

held that in absence of the Custodian, the question whether the suit house has been declared evacuee property or not could not have been decided by the Civil Court. In support of his contention, he has relied upon the judgments in the matters of: S.M. ZAKI v. THE STATE OF BIHAR AND ORS., [AIR 1953 Patna 112]; CUSTODIAN, EVACUEE PROPERTY, PUNJAB AND ORS., v. JAFRAN BEGUM, [AIR 1968 S.C. 169]; RAM GOPAL REDDY v. THE ADDITIONAL CUSTODIAN EVACUEE PROPERTY, HYDERABAD, [AIR 1966 S.C. 1438]; CHOTHU RAM v. BUDHU RAM AND ANR., [AIR 1976 PUNJAB AND HARYANA 354] and HAJI SIDDIK UMAR AND ORS., v. UNION OF INDIA, [AIR 1983 S.C. 259].

7. The plaintiff has deposed that he was residing at the suit house was purchased by his father and it belonged to his father. On demise of his father in the year 1949, the suit house along with other properties devolved upon the heirs of his father, i.e. himself, his widowed mother, his brother and the sister. In the year 1952, a family arrangement was arrived at and the suit house came to the exclusive ownership of the plaintiff. The plaintiff has produced the sale deed made in favour of his father and the deed of relinquishment executed on 16th April, 1952 by his brother and sister. Thus, he has proved that he was the sole owner of the suit house. Mr. Mithani has relied upon the deposition of one Ibrahim Haji, a Rent Inspector serving at Junagadh and the rent notes (Exhs.62 to 67), the permission granted by the Una Nagar Panchayat (Exh.61), and the Collector (Exh.71). All these documents tend to show that the suit house was declared to be evacuee property and was numbered 39. The suit house was let to the defendant under order dated 28th April, 1972 at the rent of Rs.8/- per month and that the defendant has been paying the rent regularly to the Collector. The defendant has also been permitted to carry out certain repairs and alterations in the suit house under the permission granted by the Collector (Exh.71) and by the Una Nagar Panchayat (Exh.61). In my view, therefore, the defendant has corroborated his claim of being the tenant of the Custodian by producing the documentary evidence. It, therefore, *prima facie*, establishes that the suit house was declared to be evacuee property and under Section 8 of the Act of 1950 vested in the Custodian. Under the powers vested in him, the Custodian has let the suit house to the defendant under order dated 28th April, 1972 for the rent of Rs.8/-per month. The defendant, therefore, cannot be said to have trespassed into the suit house as alleged by the plaintiff. Rightly or wrongly, the suit house has been declared to be evacuee property and the defendant was lawfully inducted in the said property by the Custodian.

I am, therefore, of the opinion that the plaintiff has failed to establish that the defendant had trespassed into the suit house after the death of Raichand Ramchand. The learned trial Judge has, therefore, rightly dismissed the claim for possession of the suit house made by the plaintiff.

8. The questions that arise are whether the trial Court was right in holding that in absence of the Custodian before the Court, the Court could not have held whether the suit house was declared to be evacuee property or not and whether the legality of any such order could have been questioned before the trial Court or not.

9. The word "evacuee" has been defined in Section 2(b) of the Act of 1950. The expression "evacuee property" has been defined in Section 2(f) thereof. Section 4 thereof gives the provisions made under the said Act and the orders made thereunder an overriding effect over the other laws. Section 7 thereof provides for issuance of notification declaring a property to be evacuee property and the procedure to be followed therebefore. Section 7-A thereof provides that no property shall be declared to be an evacuee property on or after 7th day of May, 1954. Proviso thereto carves out exception therefrom. Under Section 8 of the Act, any property declared to be evacuee property shall be deemed to have vested in the Custodian for the State. Section 9 of the Act empowers the Custodian to take possession of the evacuee property vested in him. Section 24 of the Act provides, inter alia, for an appeal against the order of Custodian to the Custodian General. Section 28 provides, inter alia, that every order made by the Custodian shall be final and shall not be called in question in any Court by way of appeal or revision or in original suit, application or execution proceedings. Section 46 specifically bars the jurisdiction of Civil or Revenue Courts to entertain and adjudicate upon any question whether any property or right or interest in property is or is not evacuee property; to question the legality of any action taken by the Custodian General or the Custodian under the Act.

10. In the matter of Ebrahim Aboobaker (*supra*), the Court was considering the validity of the order made by the Custodian declaring Aboobaker as an intending evacuee. The Court held that the Custodian General failed to comply with the requisite procedure before declaring the said Aboobaker intending evacuee. Further, said Aboobaker was declared to be intending evacuee after

his death. The Court, therefore, held that, "the order made by the Custodian General declaring Aboobaker deceased as an evacuee and the property left by him as evacuee property cannot stand and must be set aside." In the present case, the Court is not called upon to examine the validity of the order of the Custodian declaring the plaintiff as evacuee and the suit house to be evacuee property. The aforesaid judgment, therefore, shall have no applicability.

11. In the matter of Dr.Rajendra Prakash Sharma (supra), Dr.Rajendra Prakash Sharma, the appellant was the plaintiff in the suit wherein he claimed right to suit property which was sold as evacuee property and was purchased by him, the claim made by the appellant plaintiff was rejected. It was held that the plaintiff failed to substantiate his contention that the suit property was declared to be evacuee property. The contention that the Civil Court could not have questioned the order made by the Custodian was rejected. The Court further held that the presence of Custodian was not necessary. Ms. Brahmbhatt has relied upon this judgment and has submitted that, in the present case also, the facts are similar. The defendant has claimed his right to property as a transferee from the Custodian of the suit house which has been declared to be evacuee property. Ms. Brahmbhatt has submitted that the plaintiff was residing in India till the year 1958 and there was no reason why the suit house should have been declared to be evacuee property. Further, no notice has been served upon the plaintiff and there is no notification declaring the plaintiff to be evacuee and the suit house to be evacuee property. The burden of proof that the suit house was declared to be evacuee property, therefore, lies on the defendant which the defendant has failed to discharge. The defendant could have discharged the burden by producing the order made under the Act and for that, the Custodian was not a necessary party. The learned Judge has, therefore, erred in holding that the Civil Court's jurisdiction to entertain the said issue was barred under Section 46 of the Act and that the defendant was not required to prove that the suit house was declared to be evacuee property. Ms. Brahmbhatt has also submitted that since the defendant claims to be the transferee from Custodian, the burden of proof that the suit house has been declared to be the evacuee property and that the order declaring the suit house to be evacuee property is legal and valid lies on the defendant. I am afraid, I cannot accept the contention raised by Ms.Brahmbhatt. In the matter of Dr.Rajendra Prakash Sharma (supra), the plaintiff claimed

the right to evacuee property being the transferee from the Custodian. The burden of proof that the suit property was declared to be the evacuee property, therefore, lay upon the plaintiff. In the present matter, the case is the reverse. The plaintiff has alleged that the defendant is the trespasser in the suit house. The defendant was, therefore, required to establish that he was not a trespasser and he was lawfully inducted in the suit house. This he has done by producing the evidence discussed hereinabove. I am of the view that the defendant only had to establish that he was not a trespasser in the suit house. The defendant was not required to establish that the suit house was validly declared to be the evacuee property. In my opinion, therefore, the above judgment in the matter of Dr. Rajendra Prakash Sharma (*supra*) does not lend support to the contention raised by Ms. Brahmbhatt.

9. The question that remains for consideration is whether the trial Court could have entertained the question whether the suit house was or was not evacuee property or whether the order of the Custodian declaring the suit house to be evacuee property, if any, was legal and valid or not. In my view, the trial Court has rightly held that the jurisdiction of the Civil Court to entertain the above referred question is barred by Section 46 of the Act. The provision made under Section 46 of the Act is clear and unambiguous. Under the said Section, the jurisdiction of any Civil Court or Revenue Court to entertain the above referred questions is expressly barred. The above contention raised by Mr. Mithani is supported by the judgment in the matter of S.M.Zaki (*supra*). The Court has held that, Section 46 of the Act must be construed to mean that the jurisdiction of a Civil Court or a Revenue Court is ousted even if the Custodian has wrongly decided that any property is an evacuee property under the Act. A five Judges' Bench of the Supreme Court in the matter of Ram Gopal Reddy (*supra*) has taken the same view, i.e. Section 46 of the Act bars the jurisdiction of Civil or Revenue Courts to entertain or adjudicate upon any question whether any property or any right or interest in any property is or is not evacuee property. Similar is the view expressed by the Supreme Court in the matter of re Jafran Begum (*supra*). In the matter of Haji Siddik Haji Umar (*supra*) also, the Supreme Court has held that, "Section 46 of the Act which is worded very widely bars the jurisdiction of Civil or Revenue Courts in regard to the matters mentioned therein. No such Court can entertain any suit or proceeding in which the question whether any property is or is not evacuee property or in which the legality of

the action taken by the Custodian General or Custodian under the Act is questioned.

12. The law regarding the bar of jurisdiction of the Civil Court in respect of any evacuee property or in respect of the legality of any order declaring the property to be evacuee property is well settled. In the present case also, in view of the bar imposed under Section 46 of the Act, the trial Court could not have entertained the question whether the suit house was or was not declared the evacuee property. The trial Court has, therefore, rightly answered the question accordingly.

In view of the above discussion, the appeal shall fail. The appeal is, therefore, dismissed. The appellant shall bear the costs throughout. Notice is discharged.

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